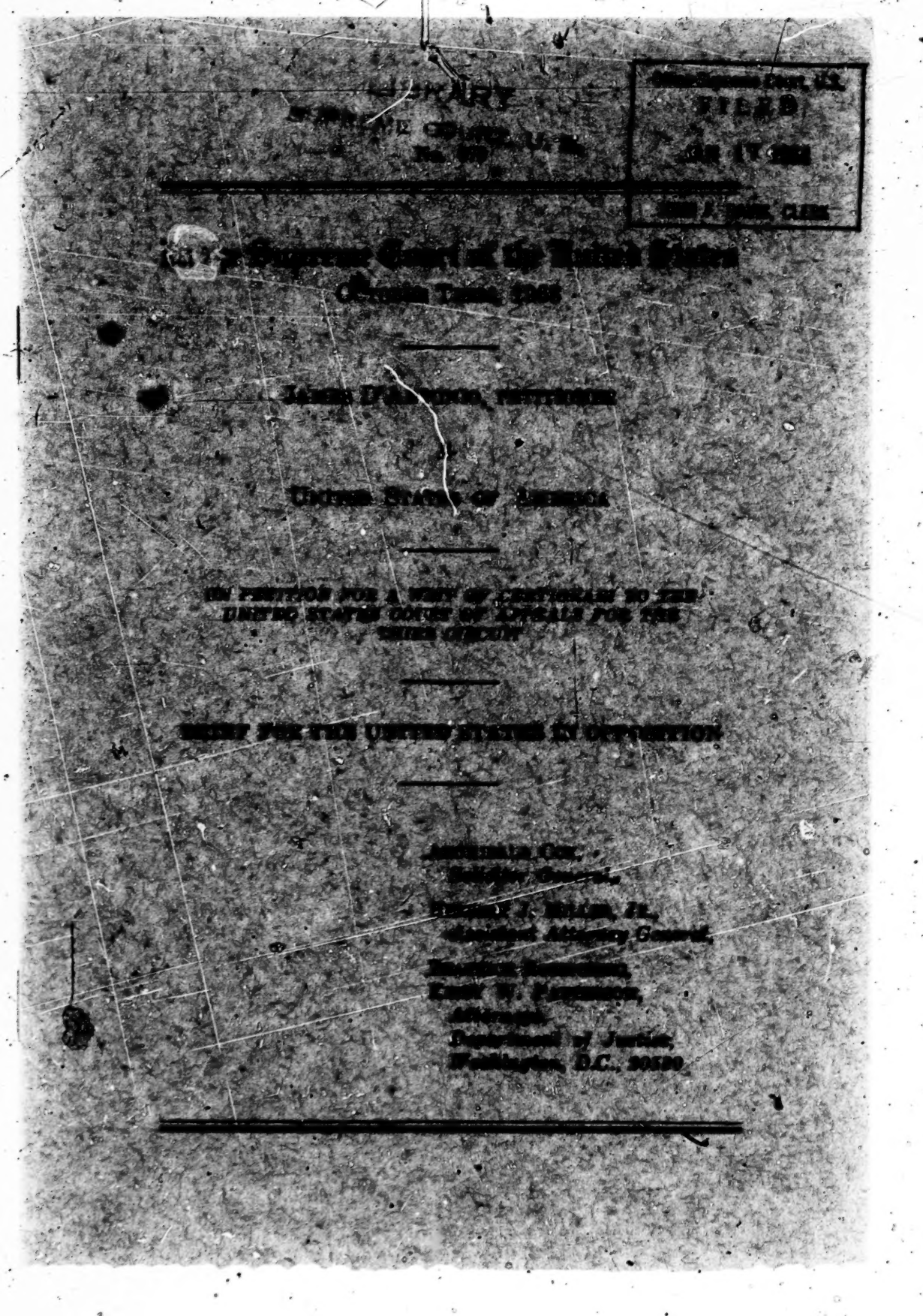


IN THE
SUPREME COURT OF THE UNITED STATES
No. 87-

FILED
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In the Supreme Court of the United States

October Term, 1987

JAMES D'AMATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

Attorney Gen.,
Solicitor General,

Assistant Attorney General,

Attorney,
Department of Justice,
Washington, D.C., 20530

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 679

JAMES D'ANTONIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11-12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1963. A petition for rehearing was

denied on November 19, 1963. The petition for a writ of certiorari was filed on December 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported petitioner's conviction for violating the laws governing distillation of alcoholic liquors and for conspiracy.

2. Whether the statutory presumption provided for in 26 U.S.C. 5601, based upon presence at the operation of an illicit still, is involved in this case where there was no charge on the presumption.

3. Whether a sketch of the premises involved, not drawn to scale, was properly admitted in evidence.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of (count 1) conspiracy to violate the internal revenue laws regarding alcohol, (count 2) failure to give bond as a distiller, (count 3) possession of an unregistered still, and (count 4) making and fermenting mash for distillation (18 U.S.C. 371, 26 U.S.C. 5601). He was given concurrent sentences of two years imprisonment on counts 1, 3, and 4 and of one year on count 2. The court of appeals affirmed. The evidence may be summarized as follows:

On May 17, 1959, two investigators for the Alcohol and Tobacco Tax Division of the Internal Revenue Service detected a strong odor of fermenting

mash coming from a two-story cinder-block building on petitioner's farm, near Freehold, New Jersey (Tr. 3-4, 57-58). They obtained a search warrant and returned to the farm early the following morning, together with other officers. About 6:30 a.m. a man went from the building to the farm house. About 7:25 a large truck entered the yard and struck and damaged a gate post as it backed toward the building. The driver engaged the man previously seen in conversation, and proceeded to the house. Shortly afterward he came out, accompanied by petitioner, and surveyed the damaged post. Petitioner then went behind the truck and a large sack was handed down to somebody. The officers approached from various directions. One of them yelled, "Federal officers. You are under arrest." Petitioner started running, but was brought into custody. Two co-conspirators (who were tried separately and who pleaded guilty) were also placed under arrest (Tr. 150-158, 63-65, 99-110, 193-194).

Inside the building was an unregistered still which was in operation (Tr. 67, 158). There were a number of bags of sugar inside the building and in the truck (Tr. 65-66, 139-140). Yeast, water and "booster" were also found in the building (Tr. 76). Further investigation of the premises disclosed a chicken house with a mash-disposal plant under the floor and a number of bags of booster. The equipment for feeding the chickens and processing the eggs was stored on the second floor, covered and surrounded by a thick layer of dust which showed no signs of having been recently disturbed (Tr. 90-92, 139). In an adjoining meadow

were three mash pits about 25 feet in diameter and an incinerator; the total amount of mash was 12,510 gallons (Tr. 11, 138). A pipe line connected the chicken house and the building containing the still, and a power line led the 195 feet from the still to the farmhouse. (Tr. 10, 30, 198-199). A man who had cared for the farm prior to its purchase by petitioner a few months previous to this raid, testified that all these installations were new (Tr. 201-211). There was no permit or bond for this distillery (Tr. 147-148).

Petitioner testified on his own behalf as follows: He bought the farm in January 1959, exhausting his resources to do so. He was largely unemployed during ensuing months and yielded to the importunings of a stranger called "Charley" to rent the barn to him for fifty dollars a month (Tr. 295-298). The man signed his name as Gene Bertelli on the lease and his helper, who went by the name of "Mike", witnessed the instrument as Carl Wright (Tr. 300, 332). Petitioner extended the power line to the barn himself and paid the electric bills (Tr. 299, 320). Petitioner was told to stay out of the building, but tried twice, unsuccessfully, to get into it (Tr. 304-305). He received no rent, but made no effort to collect because his wife wanted them out of there. She complained that there were men milling all around the place, and she was afraid to go outside. Petitioner tried to get them to move, but they objected that it had cost them a great deal of money to move their machinery and asked him to wait a couple of weeks (Tr. 305-306).

ARGUMENT

1. The record more than adequately supported the inference that the still was being operated on petitioner's premises with his full knowledge and consent. The purported lease covered only one building on the farm, while the evidence showed that the activities connected with the still covered a much larger area and could scarcely have escaped petitioner's attention. It was not probable that an operation of this kind could be carried on at a distance of two hundred feet from petitioner's dwelling house without the odor alone revealing its nature. The jury was fully justified in finding that petitioner was a participant in the operation.

2. The presumption from presence at the operation of an illicit still, under 26 U.S.C. 5601, is not involved in this case. The jury was never informed of the presumption by the instructions because of a misconception that the statute creating this presumption had been enacted after the events here involved (Tr. 246). Moreover, the sentence on count three was concurrent with that on counts one and four.

3. One of the agents made a sketch of the premises where the raid took place. He thereafter reproduced it on a blackboard which was used at the trial. The sketch was admittedly not drawn to scale and the jury was so informed (Tr. 6-8). The agent had made exact measurements of the various buildings, which he had available, but he did not insert them on his drawing, as he believed that they would simply clutter and confuse (Tr. 12). Petitioner thereafter

introduced a diagram which was drawn to scale (Tr. 23). In addition numerous photographs were admitted in evidence (Tr. 113-124). Petitioner cites no authority for the proposition that a sketch or diagram must always be drawn to scale. In the circumstances here presented there was certainly no abuse of discretion in the trial court's allowing such a sketch to be referred to in explanation of the testimony of the various witnesses, since the exact measurements were not important. The fact that the drawing was not to scale went to its weight, rather than to its admissibility. *Cf. United States* v. *Coronado Beach Co.*, 255 U.S. 472, 488; *United States* v. *Rosenberg*, 195 F. 2d 583, 598 (C.A. 2), certiorari denied, 344 U.S. 838; *Golden Eagle Farm Products* v. *Approved Dehydrating Co.*, 147 F. 2d 359, 360 (C.A. 2), certiorari denied, 325 U.S. 868.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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